IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

In the Matter of LYTTLETON B. P. GOULD, Bankrupt. JOSEPH K. SHERMAN, Trustee, Estate of Lyttleton B. P. Gould, Bankrupt, Petitioner, against WILLIAM E. BUCKLEY, *et al.*, Respondents.	No.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinions Below.

One opinion was delivered by the District Court. It was written by District Judge John W. Clancy and filed December 6, 1940. It appears on page 71 of the record. It was not reported.

The opinion of the Circuit Court of Appeals (Circuit Judges L. Hand, Swan and Augustus N. Hand, Judge L. Hand writing) was filed April 28, 1941, and is annexed to the certified transcript of the record filed herein. It is reported in 119 F. 2d 280.

Jurisdiction.

The jurisdiction of this Court is invoked under section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938, by Act of

January 31, 1928, c. 14, sec. 1, 45 Stat. 54, and by Act of June 7, 1934, c. 426, 48 Stat. 926 (28 U. S. C. A. sec. 347). The judgment of the Circuit Court of Appeals for the Second Circuit was entered May 23, 1941. The petition was filed August 15, 1941.

The Facts.

The facts are stated in the petition, page 2. We emphasize that the suit pending in the State Court was one for money damages; that the only authority granted by the bankruptcy court in the premises was the consent of the Referee that petitioner permit the bankrupt to continue to prosecute the action in his own name, with the understanding that the avails thereof would inure to the benefit of his estate; that no notice was ever given to the trustee of the application for determination of the attorneys' lien; and that respondents knew of the bankruptcy proceedings and themselves advised the State Court of same.

Specifications of Error.

The Circuit Court of Appeals erred:

1. In holding that by continuing the action *in personam* in the State court in the name of the bankrupt, the trustee submitted himself to the jurisdiction of the State court.

2. In holding that the consent of the bankruptcy court that the trustee permit the action to be continued in the State court in the name of the bankrupt, with the understanding that the avails thereof inure to the benefit of the

bankrupt estate, was a consent by the bankruptcy court that the State court could determine the validity and amount of the substituted attorneys' lien.

3. In not holding that the paramount and exclusive jurisdiction of the bankruptcy court was a bar to the determination by the State court of liens and claims against the proceeds of the plenary action *in personam* pending in the State court.

4. In not holding that the only jurisdiction of the State court was to determine the issues in the pending suit as to whether or not the plaintiff-bankrupt was entitled to damages from the defendants and the amount of such damages.

5. In not holding that a State statute giving authority to the courts of such State to determine attorneys' or other liens in actions *in personam* pending before such courts must give way to the paramount and exclusive jurisdiction given to the bankruptcy courts by Congress under authority of the Constitution.

6. In holding that unless the trustee desired to discontinue the action entirely, he must submit himself to the jurisdiction of the State court not only for a determination of the issues in the case, but also for the determination of liens against the proceeds of such case.

7. In not holding that the jurisdiction of the bankruptcy court having attached, control of the administration of the estate could not be surrendered even by that court itself.

8. In not holding that the consent by a bankruptcy court to have the interests of third persons in property

of the bankrupt adjudicated in a State court must be by actual and direct consent and not by implication from consent to try some other issue in a State court.

9. In holding that the permission of the bankruptcy court to allow the plenary action *in personam* to be prosecuted in the State court necessarily involved a consent to such incidents as the determination of the lien of displaced attorneys against the proceeds of such action.

10. In holding that the bankrupt, with the approval of the trustee, could not insist that new attorneys should represent him in the State court without the consent of such court.

11. In not holding that a litigant has the absolute right to discharge his attorney and be represented by counsel of his own selection.

Argument.

I. The decision of the Circuit Court of Appeals for the Second Circuit in the instant case conflicts with the decision of the Circuit Court of Appeals for the Eighth Circuit in *McDaniel National Bank* v. *Bridwell*, 65 F. 2d 428.

II. The decision of the Circuit Court of Appeals for the Second Circuit on an important question of local law of New York State conflicts with applicable local decisions of the State courts of New York.

III. The Circuit Court of Appeals for the Second Circuit has decided an important question of Federal law which has not been, but should be, settled by this Court.

IV. The Circuit Court of Appeals for the Second Circuit has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

V. The Circuit Court of Appeals for the Second Circuit decided a Federal question in a way probably in conflict with applicable decisions of this Court, and has decided an important question of general law in a way probably untenable or in conflict with the weight of authority.

A. The bankruptcy court has exclusive jurisdiction over the proceeds of the cause of action owned by bankrupt herein.

B. The statutory power of the State court under Sec. 475 of the Judiciary Laws of New York must yield to the exclusive jurisdiction of the bankruptcy court.

C. A bankruptcy court will protect its exclusive jurisdiction by injunction.

D. The consent of a bankruptcy court that another court may determine questions affecting property in its jurisdiction must be clear and affirmative, and its jurisdiction may not be affected by unauthorized action of its officers.

E. A void order is subject to collateral attack, which may be by injunction to restrain prosecution of void order.

I.

The decision of the Circuit Court of Appeals for the Second Circuit in the instant case conflicts with the decision of the Circuit Court of Appeals for the Eighth Circuit in *McDaniel National Bank* v. *Bridwell*, 65 F. 2d 428.

A comparison of the facts in the instant case with those in *McDaniel National Bank* v. *Bridwell, supra,* clearly shows that there is a conflict in the decision of the two circuits. The material facts are as follows:

The instant case	*McDaniel case*
1. Jan. 1934 – Gould adjudicated bankrupt and petitioner appointed trustee in bankruptcy.	1. 1927 – John H. Case adjudicated bankrupt and appellee appointed trustee in bankruptcy.
2. Trustee continued, in name of bankrupt, pending suit in State courts of New York against Murray & Flood for money damages for breach of contract and tortious interference with contract.	2. Trustee brought a plenary suit in equity in District Court against a Mrs. Winslow and appellant bank to recover asset of bankrupt, which consisted of deposit of $6,361.60 in appellant bank, deposited in name of Mrs. Winslow, and which trustee claimed belonged to bankrupt and had been transferred to her in fraud of creditors; and on October 17, 1930, judgment was entered for plaintiff trustee decreeing that defendants pay to trustee the amount of the deposit less certain items.

2a. Jan. 9, 1935 – Bankrupt moved in Supreme Court, New York County, for an order substituting Davies, Auerbach & Cornell as his attorneys in place of respondents.

3. Jan. 16, 1935 – Respondents applied to Supreme Court, New York County, to fix the sum to be paid to them as a condition to substitution.

3. Dec. 2, 1930 – Appellant bank filed a bill in equity in the same court alleging that bankrupt was indebted to bank in the sum of more than $4000. which it was entitled to offset against the deposit, and praying that it might deduct this indebtedness from the amount it was required to pay to trustee.

4. Feb. 25, 1935 – Supreme Court made an order directing substitution and awarding a lien of 30% of any moneys recovered to respondents.

4. July 1, 1931 – Court stayed execution of decree and ordered bank to pay into its registry the amount of the deposit to abide the further order of the court.

4a. Oct. 15, 1940 – Suit settled by entry of judgment against defendants for breach of contract in the amount of $40,000.00.

5. Dec. 20, 1940 – Order of Supreme Court determining lien declared void and order made by United States District Court, Southern District of New York, restraining respondents from proceeding or taking any further proceedings in Supreme Court, New York County, in interference with property of estate of bankrupt and from taking any further steps to collect except in the bankruptcy proceeding.	5. Sept. 1931 – Court dismissed suit on ground that bankruptcy court had exclusive jurisdiction over the deposit as property of the bankrupt.
6. 1941 – On appeal to Circuit Court of Appeals, the decree was reversed.	6. 1933 – On appeal to Circuit Court of Appeals, the decree was affirmed.

The facts in both cases give rise to exactly the same question of law, namely, the jurisdiction of a court over the proceeds of a suit *in personam* where bankruptcy intervenes. In the *McDaniel National Bank* case, however, the position of the appellant was much stronger than the position of respondents in the instant case, for the reason that in the *McDaniel* case the trustee himself brought an action in his own name as trustee in the Equity Court, and further the amount of the deposit in the bank was actually paid into the registry of the Equity Court, while in the instant case the suit was continued in the name of the bankrupt and the State court never had any control whatsoever over the proceeds.

In the *McDaniel* case, the court held that while a court of equity has inherent power to prevent its process from

doing injustice to anyone, and that this power may be invoked in a proper case by an ancillary or independent bill, still the court never had possession of any property or any fund and the deposit did not in any way confer jurisdiction upon the Equity Court; that the Equity Court had obtained no jurisdiction over the deposit further than the jurisdiction to determine the question of ownership; that under the law all of the assets were under the control and subject to the exclusive jurisdiction of the bankruptcy court, which could not be surrendered, and that a final determination of the title to the deposit ended the case so far as the jurisdiction of the court of equity was concerned; that thereafter jurisdiction to determine controversies with respect to this asset of the bankrupt's estate was exclusively in the court of bankruptcy, and that the claim of the bank could only be determined by the court of bankruptcy.

So, in the instant case the sole jurisdiction of the State court was the right to determine whether or not Murray & Flood were indebted to the bankrupt in accordance with the allegations of the complaint, and, if so, the amount of such indebtedness. The adjudication in bankruptcy divested the State court of any statutory right it may have had to determine, upon application, the amount of the substituted attorneys' lien, as the assets of the bankrupt, including the chose in action in suit, became subject to the exclusive jurisdiction of the bankruptcy court under authority of the Constitution. As was stated in the *McDaniel* case, the only reason that the trustee in the instant case resorted to continuance of the action in the State court against Murray & Flood, was that the court of bankruptcy was without jurisdiction to adjudicate in a summary proceeding the controversy with Murray & Flood with reference to the claim for damages, and the submission of this question to the State court was in no way a surrender of the jurisdiction of the bankruptcy

court to determine claims against the proceeds of such suit. The Circuit Court in the instant case, however, decided that such action was a surrender of such jurisdiction to the Supreme Court of New York, and it is respectfully submitted that there is, therefore, a conflict between the decisions of the Circuit Courts for the Second and Eighth Circuits.

II.

The decision of the Circuit Court of Appeals for the Second Circuit on an important question of local law conflicts with applicable local decisions of the State courts of New York.

The Circuit Court decided, in the instant case, that the trustee (actually the bankrupt) could not insist that new attorneys should represent him in the State court of New York without that court's consent, upon which consent it might impose such conditions as it saw fit.

This is of importance in the instant case as it might be possible (although this is not conceded, Point V *infra*), if substitution of attorneys in New York was a matter of discretion with the court rather than a matter of absolute right, that the court could impose certain conditions upon the substitution, and if the trustee, or the bankrupt, wished to avail himself of the benefits of the discretionary order, he must do so subject to the conditions imposed.

The decision of the Circuit Court on this important question, however, conflicts with the applicable decisions of the State courts of New York. These courts have universally held that a client who employs an attorney has an absolute right to discharge the attorney and substitute new attorneys of his own selection.

> *Crowley* v. *Wolf*, 281 N. Y. 59, 22 N. E. 2d 234;
> *Greenberg* v. *Remick & Co.*, 230 N. Y. 70, 129 N. E. 211;

Matter of Krooks, 257 N. Y. 329, 178 N. E. 548;
Matter of Dunn, 205 N. Y. 398;
Matter of Tillman, 259 N. Y. 133, 181 N. E. 75;
Martin v. *Camp*, 219 N. Y. 170, 114 N. E. 46, L. R. A. 1917 F. 402;
Matter of City of New York, 219 N. Y. 192;
Burnham v. *Brush*, 26 N. Y. Supp. 2d 397;
Degen v. *Steinbrink*, 188 App. Div. 622, 625;
Lynn v. *Agnew*, 179 App. Div. 305, 309;
Corcoran v. *Kellogg Structural Co.*, 179 App. Div. 396;
Matter of Board of Water Supply, 179 App. Div. 877;
Jeny v. *Merkle*, 128 App. Div. 833;
Roake v. *Palmer*, 119 App. Div. 64;
Johnson v. *Ravitch*, 113 App. Div. 810;
In re Cusinamo's Will, 22 N. Y. S. 2d 677, 174 Misc. 1068.

The leading case in New York on the subject is *Matter of Dunn, supra*, where the court said, at page 401:

> "That the relationship between attorney and client is one of an unusual character has been so often affirmed that a statement of the proposition is commonplace. There lie at its foundation the elements of trust and confidence on the part of the client and of undivided loyalty and devotion on the part of the attorney which render the relationship a personal and confidential one and make its obligations on the part of the attorney of the most exacting kind. This conception of it is evidenced by the facts amongst others that the statute in the case of witnesses compels the observance by the attorney of the confidences which have been intrusted to him and that the courts by virtue of their inherent power over attorneys

compel by summary and rigorous proceedings their fulfillment of obligations springing out of the relationship, while they leave to ordinary processes the enforcement of contractual obligations undertaken by one who is an attorney when they lie outside of such relationship. (*Matter of Niagara, L. & O. Power Co.*, 203 N. Y. 493, 496.)

"It is apparent that a relationship so personal and confidential may be more easily disturbed than a less sensitive one, and that its effectiveness may be so impaired by any change which destroys the confidence of the client or which required the unwilling transfer by the attorney of his allegiance in a given matter to a substituted client as to make it desirable to permit a termination of the relation rather than to attempt to coerce its continuance under adverse conditions. This policy of permitting its dissolution in a manner which would not prevail in the case of ordinary contracts has been upheld in various cases.

"It is well established in the case of the client that he may at any time for any reason which seems satisfactory to him, however arbitrary, discharge his attorney. If the latter has not been guilty of any tangible violation of the relation, this substitution must be made on conditions which are fair to him. (*Tenney* v. *Berger*, 93 N. Y. 524, 529; *Matter of Prospect Avenue*, 85 Hun 257; *Matter of Paschal*, 77 U. S. 483, 496.)"

The rule is also well stated in *Martin* v. *Camp, supra*, where the court stated at page 173 of 219 N. Y.:

"Notwithstanding the fact that the employment of an attorney by a client is governed by the contract which the parties make, the peculiar relation of trust and confidence that such a relationship implies in-

jects into the contract certain special and unique features. In *Marsh* v. *Holbrook* (3 Abb. Ct. App. Dec. 176) the question whether an attorney could recover upon a *quantum meruit* merely or might recover in an action for damages for breach of contract was discussed. Two members of the court who participated in the decision of that case were of the opinion that the attorney was entitled to recover the whole contract price. The question was not, however, determined, Judge WOODRUFF pointing out that the question was not necessarily before the court as the attorney had not appealed from the judgment. Since the decision of that case the nature of the contract existing between attorney and client has been the subject of frequent discussion. (*Matter of Dunn*, 205 N. Y. 398 and cases cited: *Andrewes* v. *Haas*, 214 N. Y. 255, 259.) These cases and many others that might appropriately be cited to the same effect establish that while so far as the attorney is concerned the contract is entire and the attorney cannot recover unless he completely performs, the client with or without cause may terminate the contract at any time. The substance of the rule declared in these cases was expressed by Judge HISCOCK in *Matter of Dunn* (*supra*). In that case it was said: 'It is well established in the case of the client that he may at any time for any reason which seems satisfactory to him, however arbitrary, discharge his attorney.' (p. 402).

"That the client may at any time for any reason or without any reason discharge his attorney is a firmly-established rule which springs from the personal and confidential nature of the relation which such a contract of employment calls into existence. (*Matter of Dunn*, 205 N. Y. 398.) If the client has the right to terminate the relationship of attorney

and client at any time without cause, it follows as a corollary that the client cannot be compelled to pay damages for exercising a right which is an implied condition of the contract. If in such a case the client can be compelled to pay damages to his attorney for the breach of the contract, the contract under which a client employs an attorney would not differ from the ordinary contract of employment. In such a case the attorney may recover the reasonable value of the services which he has rendered but he cannot recover for damages for the breach of contract. The discharge of the attorney by his client does not constitute a breach of the contract, because it is a term of such contract, implied from the peculiar relationship which the contract calls into existence, that the client may terminate the contract at any time with or without cause.''

The right of a litigant to counsel of his own selection is secured to him by constitutional and statutory provisions. This was discussed by Justice EDER in *Burnham* v. *Brush, supra,* who stated, at page 399:

> ''* * * this right of a litigant to a counsel of his own selection is generally secured to him by constitutional or statutory provisions, both in civil and criminal cases (Amend. VI, U. S. Const.; Art. I, Section 6, New York State Const.; Section 236, Civil Practice Act; *People* v. *Price,* 262 N. Y. 410, 187 N. Ed. 298; *People* v. *Hull,* 251 App. Div. 40, 296 N. Y. S. 216; *Kerling* v. *G. W. Van Dusen & Co.,* 109 Minn. 481, 124 N. W. 235, 236, 372; *In re Mandell,* 2 Cir., 69 F. 2d 830), and while this right is not a natural right but a creature of positive law, the extent to which it may be impinged is, I think, a matter open to debate. In the *Price* case (262 N. Y. 410,

187 N. Ed. 299), the court said: 'Under both our Federal and State Constitutions, a defendant has the right to defend in person or by counsel of his own choosing. * * * Where, therefore, a (person) appears by his own attorney, there is no power in the court to assign counsel at any stage of the proceedings.' While that principle was enunciated in a criminal case and dealt with constitutional provisions, Section 236, Civil Practice Act, is indicative of the same thought. And *In re Mandell, supra* (69 F. 2d 831), the court reversed an order imposing an attorney on a trustee in bankruptcy who was not one of his own choice, saying, '* * * in general we regard it as inimical to good administration to fasten an attorney on the trustee against his will.' "

In *Jeny* v. *Merkle, supra*, the County Court denied a motion by a litigant for substitution of attorneys. On appeal to the Appellate Division, that court reversed the lower court, saying, at page 834:

> "This is an appeal from an order denying a motion made by the plaintiff for a substitution of attorneys. The client has the right without assigning cause to change his attorney, and the only question before the court on this motion was whether the order should be made unconditionally or conditionally upon the plaintiff's paying or securing payment of attorney's fees. (*Matter of Prospect Avenue*, 85 Hun, 257; *Barkley* v. *N. Y. C. & H. R. R. Co.*, 35 App. Div. 167.)"

The same rule was enunciated by the United States Supreme Court in the case of *In re Paschal*, 10 Wall. (77 U. S.) 483, where this Court held that a party has a general right to change his attorney, as "the relations

between counsel and client are of a very delicate and confidential character, and unless the utmost confidence prevails between them the client's interest must necessarily suffer."

The decision of the Circuit Court on this particular question was therefore clearly in conflict with the decisions of the State courts of New York, and it is apparent that the Circuit Court based its decision upon the erroneous view that a client may not insist that new attorneys should represent him in a court without the consent of that court, upon which it might impose such conditions as it sees fit.

III.

The Circuit Court of Appeals for the Second Circuit has decided an important question of Federal law which has not been, but should be, settled by this Court.

While it is submitted that the decisions of this Court in *Gross* v. *Irving Trust Co.*, 289 U. S. 342, 77 L. Ed. 1243, 53 S. Ct. 342; *Taylor* v. *Sternberg*, 293 U. S. 470, 79 L. Ed. 599, 55 S. Ct. 260, and *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 75 L. Ed. 645, 51 S. Ct. 270, are applicable to the issues in the instant case, and that the decision of the Circuit Court below was contrary to these decisions (See Point IV, *infra*), this Court has never decided the questions raised herein on facts exactly like those in the instant case.

There is no question but that bankruptcy courts have exclusive jurisdiction over all property of bankrupts in their actual or constructive possession at the time of the filing of the petition in bankruptcy; and that this exclusive jurisdiction carries with it the sole power to ascertain the validity and amount of existing liens, and to decree the method of their liquidation The jurisdic-

tion in bankruptcy is made exclusive in the interest of the due administration of the estate and the preservation of the rights of both secured and unsecured creditors.

Issacs v. *Hobbs Tie & Timber Co., supra.*

The issues in the instant case raise several questions which are of the utmost importance, so that bankruptcy courts and their officers may know just what acts of theirs would constitute a consent that some other court determine questions which otherwise would rest solely in the jurisdiction of the bankruptcy court.

These questions are as follows:

1. Where a bankruptcy court consents that the trustee prosecute an action *in personam* in the name of a bankrupt, does such consent carry with it an implied consent that the court in which such action is pending may determine claims to or liens against the proceeds of such action?

2. Where a trustee institutes, intervenes in, or continues in the name of a bankrupt, a plenary suit *in personam* for money damages, does the trustee thereby submit himself to the jurisdiction of the court in which such suit is instituted or is pending to the extent that such court may determine liens or claims, such as attorneys' liens, against the proceeds of such suit?

3. Where a trustee, with the consent of the bankruptcy court, allows to be continued in the name of the bankrupt a plenary suit *in personam,* with the understanding that the fruits of such suit shall inure to the benefit of the bankrupt's estate, does he thereby submit himself to the jurisdiction of the court in which such suit is pending so that he is liable for costs, or attorneys' fees, etc.?

As to questions 1 and 2, the decision of the Circuit Court holding that the consent to the prosecution of the action was a consent to the determination of the lien and a submission by the trustee to the jurisdiction of the State court is contrary to the purpose of the bankruptcy laws giving exclusive jurisdiction to the bankruptcy courts and the motivating force which caused the framers of the Constitution to give Congress the power to enact uniform laws on the subject of bankruptcy throughout the United States. This motivating force was the desire to insure the orderly administration of an estate in bankruptcy in a single court, including the power and jurisdiction over all cases and controversies between the bankrupt and his creditors for the collection of assets and the ascertainment and liquidation of liens thereon, and for the marshaling and disposition of funds so as to secure the rights of all parties and to effect a due distribution among all creditors.

It is of the utmost importance that this court determine these questions so that the exclusive jurisdiction of the bankruptcy court shall not be inadvertently and unknowingly, or by implication, delegated to some other court.

As to the third question, the decision of the Circuit Court that the continuation of an action by a trustee in the name of a bankrupt, or the permission of a trustee that a bankrupt continue an action *in personam*, with the understanding that the fruits of the litigation shall inure to the benefit of the estate in bankruptcy, is a submission to the jurisdiction of the court in which such action is pending, is contrary to *dicta* of the same Circuit Court in *In re Prudence Co.*, 96 F. 2d 157, where said court said that a trustee may allow the suit to be continued by the bankrupt and later claim the fruits of any recovery, and by so doing would be able to obtain the benefit of such judgment as bankrupt might finally obtain without sub-

jecting the estate to liability for attorneys' services or for costs in case the suit should fail.

This important question as to the liability of a trustee in circumstances such as these has never been decided by this Court, and should be decided by this Court so that the bankruptcy courts and their officers may be advised as to their liability in such circumstances and may therefore guide themselves accordingly.

The questions discussed herein are also discussed under Point V hereof as they arise in connection with the argument thereunder.

IV.

The Circuit Court of Appeals for the Second Circuit has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

A. The decision herein is in conflict with the decisions of the Supreme Court in *Gross* v. *Irving Trust Co., supra,* and *Taylor* v. *Sternberg, supra.*

A comparison of the facts in the instant case with those in *Gross* v. *Irving Trust Co.* and *Taylor* v. *Sternberg,* will show that the rulings of law established in those two cases are applicable to the instant case, and that the conclusions of the Circuit Court are in conflict with the decisions of this Court. The material facts in these cases, as compared to the facts in the instant case, are as follows:

The instant case	*Gross* v. *Irving Trust Co.* & *Taylor* v. *Sternberg*
1. Suit for damages instituted in Supreme Court, New York County, against Murray & Flood.	1. Receivership proceedings instituted in State courts.

2. Plaintiff adjudicated bankrupt, and trustee appointed.	2. Defendants adjudicated bankrupts and trustees appointed.
3. After application for substitution of attorneys in State court action, respondents applied for order fixing value of their attorneys' lien in accordance with the provisions of Section 475 of the Judiciary Law of New York giving the court the power, upon the petition of the client or attorney, to determine such lien.	3. Prior to turning over to the trustees in bankruptcy the assets of bankrupts, the receivers and their counsel applied to their respective State courts for determination and allowance of their fees in accordance with the provisions of the statutes in the respective States giving their courts the power to determine and make allowances to receivers and attorneys in proceedings in such courts.
4. The State court determined the amount of the attorneys' lien of respondents and awarded a lien of 30% upon any moneys recovered in the action together with a lien for disbursements necessarily made, and appointed Philip J. Sinnott referee to hear testimony with respect to the amount of disbursements necessarily incurred.	4. The State courts made various allowances to the receivers and attorneys.

5. The bankruptcy court, in ancillary proceedings brought for the purpose in the Southern District of New York, enjoined respondents from taking any further steps to collect upon their asserted attorneys' lien except in the bankruptcy proceeding of Lyttleton B. P. Gould.	5. The bankruptcy courts, in summary proceedings, directed the receivers and attorneys to turn over to the trustees in bankruptcy the amounts awarded to them by the State courts and remitted them to the bankruptcy courts for proceedings with respect to their claims for allowances.
6. On appeal to the Circuit Court of Appeals, the decree of the District Court was reversed.	6. On appeals to the Circuit Courts of Appeals, the decrees of the District Courts were affirmed.
7. Petitioner now prays for a Writ of Certiorari to the Circuit Court of Appeals.	7. On Writs of Certiorari to the Circuit Courts of Appeals, the decrees of said courts were affirmed.

The decisions of this Court in *Gross* v. *Irving Trust Co.* and *Taylor* v. *Sternberg*, in the light of these facts, are clearly applicable to the instant case. The State statute giving the court the right to determine the attorneys' lien is no more sancrosanct than the statutes authorizing the State courts to make allowances in receivership cases. And, as this Court held in the two cases under discussion, with the filing of the petition in bankruptcy, the power of the State courts under these statutes ceased and the orders of the State courts were nullities, the jurisdiction of the bankruptcy court being paramount and exclusive.

It is submitted, therefore, that so, in the instant case, did the power of the New York court to determine the attorneys' lien cease, the chose in action having passed into the possession of the bankruptcy court and the jurisdiction of the bankruptcy court being paramount and exclusive. The State statutes must give way to the paramount federal laws enacted under authority of the Constitution. And so, in the instant case, the decision of the Circuit Court was in conflict with applicable decisions of this Court.

B. The decision herein is in conflict with the decision of this Court in *Isaacs* v. *Hobbs Tie & Timber Co., supra.*

A comparison of the actions of the trustees in the instant case and in the *Isaacs* case shows them to be analogous, and that the principles of law enunciated by this Court in the *Isaacs* case are applicable to the instant case. The facts, in sequence, in the two cases are as follows:

The instant case	*Isaacs case*
1. L. B. P. Gould adjudicated bankrupt and Joseph K. Sherman appointed trustee in proceedings in Connecticut.	1. Henrietta E. Cunningham adjudicated bankrupt and B. K. Isaacs appointed trustee in proceedings in Texas.
2. Trustee permitted continuation of pending suit in State court of New York by bankrupt with understanding that the avails of the suit would inure to the benefit of bankrupt's estate.	2. Hobbs Tie & Timber Co. commenced foreclosure action of mortgage in a State court of Arkansas to foreclose on certain property of bankrupt.

3. Bankrupt, with approval of trustee, moved to substitute new counsel in said suit in the State court.	3. Trustee and bankrupt appeared specially in the State court proceeding, and then petitioned for removal of the cause to the United States District Court for the Western District of Arkansas, and there filed an answer alleging no jurisdiction, as the bankruptcy court had exclusive jurisdiction and had not consented to the foreclosure.
4. Upon application of respondents, the State court fixed their attorneys' lien at 30% of any recovery, plus disbursements.	4. The District Court struck out so much of the answer of the trustee as sought to delay judgment and sale, and entered, on the pleadings, a decree of foreclosure and sale.

In the *Isaacs* case, on Certificate from the Circuit Court, and on Writ of Certiorari to the District Court, this Court held that the paramount and exclusive jurisdiction of the bankruptcy court having attached to the property in question, no other court could interfere; that while valid liens existing at the time of the commencement of a bankruptcy proceeding are preserved, it is solely within the power of a court of bankruptcy to ascertain their validity and amount, and to decree the method of their liquidation; that the removal of the cause by the trustee from the State court to the Federal court was not a waiver or estoppel as to the jurisdictional question, nor

a submission to the jurisdiction of the Federal court in the foreclosure proceeding, as it is beyond the power of the bankruptcy court's officers to oust it of jurisdiction.

So, in the instant case, the continuation of the action for money damages could not oust the bankruptcy court of its exclusive jurisdiction to determine the validity and amount of the attorneys' lien against the proceeds of the suit for money damages, no permission having been given by the bankruptcy court to the State court to make such determination.

It is significant to note that this Court stated that the trustee in the *Isaacs* case might have instituted ancillary proceedings in the District Court for the Western District of Arkansas and there obtained an injunction to restrain the Hobbs Tie & Timber Co. from foreclosing its mortgage. This was exactly the procedure followed in the instant case where the trustee instituted ancillary proceedings in the District Court for the Southern District of New York and there obtained an injunction restraining respondents from attempting to collect on the lien awarded and remitting respondents to the bankruptcy court for a determination of their lien.

The judgment of the Circuit Court reversing the decree of the District Court, and holding that the trustee, by continuing the action in manner aforesaid, submitted himself to the jurisdiction of the State court and waived the exclusive jurisdiction of the bankruptcy court, was clearly in conflict with the applicable decision of this Court in *Isaacs* v. *Hobbs Tie & Timber Co.*

V.

The Circuit Court of Appeals for the Second Circuit decided a Federal question in a way probably in conflict with applicable decisions of this Court, and has decided an important question of general law in a way probably untenable or in conflict with the weight of authority.

It is submitted that the decision of the Circuit Court herein is in conflict with the applicable decision of this Court in *Kalb* v. *Feuerstein*, 308 U. S. 433. Before discussing this conflict, however, it will be well to discuss the questions of general law involved, so that the law, as set forth in *Kalb* v. *Feuerstein*, may be taken up in its proper place after being demonstrated as applicable herein.

The Circuit Court in the instant case decided, in effect, that the pendency of a suit *in personam* in a State court conferred jurisdiction on that court to determine liens against the proceeds of such suit, despite the fact that a court of superior jurisdiction had custody of the *res*, which in the instant case was the chose in action in suit, and that the prosecution of such a suit *in personam* was a consent to the determination by the State court of such lien against the proceeds.

In order to adequately discuss this reason for the granting of the petition for Certiorari herein, it is necessary to go into the merits of the case. Before doing so, however, it will be well to state that the principles of law discussed hereinafter with relation to the jurisdiction of the bankruptcy courts are really general rules of law laid down with respect to the power of any court of competent jurisdiction. This is because the principle, that when the jurisdiction of a bankruptcy court has attached to property, the court's possession cannot be affected by

proceedings in any other court and its jurisdiction is exclusive, is but an application of the well-recognized rule that when a court of competent jurisdiction takes possession of property through its officers, this withdraws the property from the jurisdiction of all other courts which, though of concurrent jurisdiction, may not disturb that possession.

> *Isaacs* v. *Hobbs Tie & Timber Co., supra;*
> *Wabash R. Co.* v. *Adelbert College*, 208 U. S. 38; 52 L. Ed. 379; 28 S. Ct. 182.

It is seen, therefore, that the matters discussed hereinafter, while pertaining to the bankruptcy court and its officers in the instant case, are questions of general law.

A. The bankruptcy court has exclusive jurisdiction over the proceeds of the cause of action owned by bankrupt herein.

Upon the adjudication in bankruptcy of Lyttleton B. P. Gould, on January 11, 1934, title to all property in his possession at the time of the filing of his petition in bankruptcy vested in his trustee.

> *Isaacs* v. *Hobbs Tie & Timber Co., supra;*
> *Gross* v. *Irving Trust Co., supra;*
> *Taylor* v. *Sternberg, supra.*

The possession conferring exclusive jurisdiction in the bankruptcy courts need not be actual, but may be constructive, as in the case of choses in action.

> *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U. S. 300, 56 L. Ed. 208, 32 S. Ct. 96, 27 A. B. R. 262;

Mueller v. *Nugent*, 184 U. S. 1, 14, 46 L. Ed. 405, 22 S. Ct. 269;
Collier on Bankruptcy, 14th Edition, Vol. 2, Sec. 23, Page 471;
Remington on Bankruptcy, 4th Edition, Vol. 5, Sec. 2365, Page 542.

The claim for money damages for breach of contract and for wrongful interference with a contract in the instant case is such a chose in action, whose constructive possession gives the bankruptcy court exclusive jurisdiction.

In re Weston (C. C. A. 2), 68 F. 2d 913.

See also Collier on Bankruptcy, 14th Ed., Vol. 2, Sec. 23, Page 473, where the rule is stated, as follows:

> "Where the intangible consists of a chose in action, such as a debt owed the bankrupt or a contract claim, such intangible may be said to be in the constructive possession of the bankruptcy court so as to enable the court summarily to determine the rights of various claimants to the chose in action, if the bankrupt remained the legal owner up to the time of the filing of the petition."

So, in the instant case, the claim for money damages, in suit in the State courts of New York, not having been assigned by the bankrupt, was in his constructive possession at the time of the filing of his petition and became subject to the exclusive jurisdiction of the bankruptcy court.

In re Marsters (C. C. A. 7), 101 F. 2d 365, Cert. denied 306 U. S. 663, 59 S. Ct. 788, 83 L. Ed. 1059;
In re Worrall (C. C. A. 2), 79 F. 2d 88.

Nor does the fact that the claim of bankrupt was in suit and that such suit was pending in the State courts alter the situation in any way. Bankrupt was still the sole owner of the chose in action and had done nothing to alienate his title to or possession of same. Although the bankruptcy of Gould did not divest the Supreme Court of New York of jurisdiction of the pending action, it divested that court of jurisdiction to deal with the avails of the action, since the chose in action and the proceeds of same were property of the bankrupt's estate. The pending suit was one *in personam*, since it was an action for money damages for breach of contract and wrongful interference with a contract.

Riehle v. *Margolies*, 279 U. S. 218, 73 L. Ed. 669, 672, 673;
Rosser v. *Rosser*, 42 N. M. 360, 78 P. 2d 1110, 1112;
1 Am. Jur., Actions, Sec. 44;
1 C. J. S., Actions, Sec. 1 (f [5] and [6]).

And an action *in personam* gives the court before which it is pending no jurisdiction over any *res*; it merely gives such court jurisdiction to determine the issues raised by the pleadings, *i. e.*, in the instant case, whether or not bankrupt was entitled to damages from Murray & Flood, and if so, the amount of such damages.

McDaniel National Bank v. *Bridwell* (C. C. A. 8), *supra*;
Long & Alstatter Co. v. *Willis*, 3 N. E. 2d 910, 52 Ohio App. 299, appeal dismissed, 2 N. E. 2d 60, 131 Ohio St. 287.

Neither did the lien of respondents give them any rights as adverse claimants so that they might object

to the jurisdiction of the bankruptcy court, nor did the lien convert the State court proceeding to one *in rem*. In *Fischer-Hansen* v. *Brooklyn Heights R. R. Co.*, 173 N. Y. 492, the court stated, at page 500:

> "A cause of action is not the property of the attorney, but of the client. The attorney owns no part of it, for a lien does not give a right to property, but a charge upon it."

See also:

Fish v. *East* (C. C. A. 10), 114 F. 2d 177;
Beeler v. *Schumacher* (C. C. A. 6), 80 F. 2d 715.

The orderly administration of a bankrupt's estate requires that bankruptcy courts have exclusive jurisdiction to marshal all assets of a bankrupt, and to determine the validity, amount and method of liquidation of liens upon the assets and claims against the estate. And the paramount and exclusive jurisdiction over such property, given to the bankruptcy courts, under authority of the Constitution, gives to such courts the sole power to ascertain the validity and amount of all liens, and to decree the method of their liquidation.

Isaacs v. *Hobbs Tie & Timber Co., supra;*
Whitney v. *Wenman*, 198 U. S. 539, 49 L. Ed. 1157, 25 S. Ct. 778;
Gamble v. *Daniel* (C. C. A. 8), 39 F. 2d 447, Certiorari denied 282 U. S. 848, 75 L. Ed. 752;
In re Schermerhorn (C. C. A. 8), 145 F. 341.

In *Isaacs* v. *Hobbs Tie & Timber Co., supra*, this Court stated the rule, at page 738 of U. S. Reports, as follows:

> "Thus, while valid liens existing at the time of the commencement of a bankruptcy proceeding are preserved, it is solely within the power of a court of bankruptcy to ascertain their validity and amount and to decree the method of their liquidation."

The action in the State court being one *in personam*, and such court having no jurisdiction over any *res*, and the bankruptcy proceedings being in *rem* with exclusive jurisdiction over the property of bankrupt, the State court could not interfere with or affect such property. This is because any such interference with the essential powers of the bankruptcy court would thwart the fundamental purpose of due distribution among lienors and creditors contemplated by the Bankruptcy Act.

> *Isaacs* v. *Hobbs Tie & Timber Co., supra;*
> *Taylor* v. *Sternberg, supra.*

In this contention, petitioner is supported not only by the highest Federal authority, but by the highest State authority of the State in which the action was pending in the instant case, as well. In *Northeastern R. E. Sec. Corp.* v. *Goldstein*, 276 N. Y. 64, at page 69 (11 N. E. 2d 354, 356), the court said:

> "Where an action is commenced after adjudication which affects property actually or constructively in the possession of the trustee, the bankruptcy court has exclusive jurisdiction and a State court is without jurisdiction."

B. The statutory power of the State court under Section 475 of the Judiciary Laws of New York must yield to the exclusive jurisdiction of the bankruptcy court.

Bankruptcy courts having exclusive jurisdiction, as aforesaid, statutory powers granted to State courts, insofar as such powers may affect property subject to the exclusive jurisdiction of the bankruptcy courts, must give way to the superior jurisdiction of such bankruptcy courts. As this Court stated, in *Kalb* v. *Feuerstein*, 308 U. S. 433, 439, 84 L. Ed. 370, 374, 60 S. Ct. 343, 346:

> "The States cannot, in the exercise of control over local laws and practice, vest State courts with power to violate the supreme law of the land. The Constitution grants Congress exclusive power to regulate bankruptcy and under this power Congress can limit the jurisdiction which courts, State or Federal, can exercise over the person and property of a debtor who duly invokes the bankruptcy law."

So, as in the instant case, the power granted to the State courts of New York by Section 475 of the Judiciary Laws, upon petition of the client or the attorney, to determine and enforce an attorney's lien, must yield to the exclusive jurisdiction vested in the bankruptcy courts by Congress under authority of the Constitution. The State of New York cannot, in the exercise of control over practice and litigation in its courts, vest such courts with power to violate the bankruptcy laws enacted under the supreme law of the land, the Constitution. And, in ruling as it did, the decision of the Circuit Court in the instant case is in conflict with the decision of this Court in *Kalb* v. *Feuerstein, supra.*

The authority to determine attorneys' liens under the New York laws is comparable to the power granted by

statute to State courts in receivership proceedings to make allowances to their officers, such as receivers and attorneys, in such proceedings. And it no longer is open to question but that upon the filing of a petition in bankruptcy, the State court is divested of such power, and its officers must be remitted to the bankruptcy court for such allowances.

This principle of law was enunciated by this Court in *Gross* v. *Irving Trust Co., supra,* and in *Taylor* v. *Sternberg, supra,* where this Court held that the statutory powers of State courts to make allowances to their officers in receivership cases pending in such courts were superseded by the exclusive jurisdiction over property of a bankrupt given to bankruptcy courts by Congress under authority of the Constitution. Compare also *McDaniel National Bank* v. *Bridwell, supra,* where the Circuit Court for the Eighth Circuit held that the inherent power of an equity court to prevent its own process from working injustice to anyone is superseded by bankruptcy proceedings.

And the Circuit Court for the Second Circuit itself, in *In re No. 32 East 67th Street,* 96 F. 2d 795, indicated that the matter of an attorney's lien under Section 475 of the Judiciary Law of New York is a matter to be determined by the bankruptcy court only, after adjudication; the Court, in that case, saying at page 796:

> "Whether they have a charging lien by virtue of section 475 of the New York Judiciary Act, Consol. Laws, c. 30, is a question which may be determined by the bankruptcy court if presented to it."

See also:

> *Chicago, R. I. & P. Ry. Co. of City* v. *Owatonna,* 120 F. 2d 226.

The Circuit Court, in the instant case, determined that the State court had jurisdiction to determine the attorneys' lien, as the continuation of the action involved a consent to such incidents as the exercise of that court's jurisdiction might involve, among them, that as a condition upon the substitution of new attorneys, the lien of the displaced attorneys must be liquidated. This decision was based upon the theory that the matter of substitution of attorneys was a matter of discretion with the court before whom the suit was pending, rather than a matter of absolute right. The court said, 119 F. 2d, at page 282:

> "He could not insist that new attorneys should represent him in that court without its consent, upon which it might impose such conditions as it saw fit."

It is submitted that under the law, such right of a State court is superseded by bankruptcy even though the matter of substitution is one of discretion with the State court. However, for the purpose of argument, let us assume that where a matter is discretionary, the State court may impose such conditions as it sees fit. Still, the Circuit Court in the instant case could not justify its decision on such a proposition of law, for in holding as it did, as above quoted, the Court went astray. It proceeded upon a false and unfounded theory, as the courts of New York have definitely established the principle that a litigant may discharge his attorney at any time, with or without cause, and, upon his application, the court must substitute the new attorneys of litigant's own selection. See Point II. of Argument, *supra*, and cases cited thereunder. This is not only the law as established by the courts of New York, but also as established by this Court. *In re Paschal, supra.*

C. A bankruptcy court will protect its exclusive jurisdiction by injunction.

Where a bankruptcy court has exclusive jurisdiction over property, as aforesaid, it will protect this jurisdiction by injunction.

Isaacs v. *Hobbs Tie & Timber Co., supra;*
Ex Parte Baldwin, 291 U. S. 610, 78 L. Ed. 1020, 54 S. Ct. 551;
Continental Ill. N. B. & T. Co. v. *C. R. I. & P. R. Co.,* 294 U. S. 648, 79 L. Ed. 1110, 55 S. Ct. 595.

And where, as in the instant case, the property in the actual or constructive possession of the bankruptcy court is outside of the territorial limits in which such court has jurisdiction, the proper procedure is for the trustee to institute ancillary proceedings in the district where the property lies, and to obtain the necessary injunctive relief in such ancillary proceedings.

Isaacs v. *Hobbs Tie & Timber Co., supra;*
Ex Parte Baldwin, supra.

So, in the instant case, ancillary proceedings were instituted in New York, where the judgment was rendered, and where judgment debtors and respondents were located, and injunctive relief was obtained in the District Court for the Southern District of New York.

D. The consent of a bankruptcy court that another court may determine questions affecting property under its jurisdiction must be clear and affirmative, and its jurisdiction may not be affected by unauthorized action of its officers.

In this connection, we start with the proposition that a trustee, as in the instant case, may permit a bankrupt to prosecute a suit on a cause of action which is property of bankrupt's estate, and upon the successful termination of such suit the trustee may take the fruits of the litigation for the benefit of the estate.

Johnson v. *Collier*, 222 U. S. 538, 540, 56 L. Ed. 306, 32 S. Ct. 104;
In re Prudence Co., Inc. (C. C. A. 2), 96 F. 2d 157, 36 Am. B. R. (N. S.) 525;
Collier on Bankruptcy, 14th Ed., Vol. 1, Sec. 11, Page 1177.

By so doing, the trustee does not submit himself or the estate in bankruptcy to the jurisdiction of the court wherein the plenary action is pending.

In re Prudence Co., Inc., supra;
Kessler v. *Herklotz*, 117 N. Y. Supp. 45, 132 App. Div. 278, 22 Am. B. R. 257.

So, in the instant case, it is respectfully submitted that the trustee did not submit himself or the estate to the jurisdiction of the State courts of New York, so that such courts could determine liens against or claims to the proceeds of the suit. The Circuit Court was therefore in error herein in holding that the trustee could not avoid submitting himself to the jurisdiction of the court where

the action was pending "by hiding behind the formal plaintiff," and that "we deal with the case as though he had been openly the party plaintiff." This question, however, is one of importance in bankruptcy matters, and should be settled definitely by this Court.

Indeed, the general rule is that a bankruptcy court itself may not surrender its jurisdiction over the administration of an estate to another court.

> *United States Fidelity & Guaranty Co.* v. *Bray*, 225 U. S. 205, 56 L. Ed. 1055, 32 S. Ct. 620;
> *Gross* v. *Irving Trust Co., supra*;
> *Isaacs* v. *Hobbs Tie & Timber Co., supra.*

However, to this general rule, there is an exception to the effect that a bankruptcy court may, in its discretion, permit a State court to try a certain issue when such bankruptcy court feels that the State court is in a better position to determine the same expeditiously. This was indicated by this Court in *Isaacs* v. *Hobbs Tie & Timber Co.*, in the general statement that other courts could not deal with property of a bankrupt or liens upon same "save by consent of the bankruptcy court." And again, in *Ex Parte Baldwin, supra*, Mr. Justice Brandeis, speaking for this Court, said:

> "Moreover, the bankruptcy court might, in the exercise of its discretion, conclude that it is desirable to have the litigation proceed in the State court."

This authority to a bankruptcy court to permit another court to try such issues, being an exception to the general rule, it is submitted that the consent by the bankruptcy court that some other court try questions of title to or liens against property in its possession, must be affirmative and clear, and such consent should not be inferred

by implication from its consent that some other issue be so tried.

This was indicated by the Circuit Court of Appeals for the Second Circuit in *In re Weston*, 68 F. 2d 913, where the Court held that it would be necessary for the trustee to bring suit in a State court to determine the amount of a debt due to bankrupt, but that a mechanic's lien against such fund could only be adjudicated by the bankruptcy court. The Court said, at page 916:

> "The plenary suit necessary to ascertain the amount of the fund to be paid by the state must be brought by the trustee in the proper state court. Here the mechanic's lien is asserted against a fund to be paid by the State for a public improvement. There is no specific *res* but the lienor becomes by virtue of the statute the assignee of the debt to the contractor to the extent of his claim. *Arrow Iron Works* v. *Greene*, 260 N. Y. 330, 183 N. E. 515. Jurisdiction to determine the validity of that lien is vested in the bankruptcy court. The court below had authority and it was its duty to grant an injunction. *In re Everick Corp.*, 39 F. (2d) 765 (C. C. A. 2)."

Compare also *McDaniel Nat. Bank* v. *Bridwell*, *supra*, where the Circuit Court of Appeals for the Eighth Circuit held that a suit by a trustee, to recover money alleged to be that of bankrupt, in an equity court gave that court no jurisdiction other than to determine the issues in the case; that a final determination of the title to the deposit in question rather obviously ended the case so far as the jurisdiction of the court of equity was concerned; and that thereafter jurisdiction to determine controversies with respect to this asset of the bankrupt's estate was vested in the court of bankruptcy just as completely as if the title to the deposit had been in the bank-

rupt at the time his petition was filed. As the court said, page 430:

> "The only reason the trustee had resorted to the court as a court of equity was that the court of bankruptcy was without jurisdiction to adjudicate in a summary proceeding a controversy with reference to property held adversely to the bankrupt estate unless the consent of the adverse claimant was obtained."

So, in the instant case, the bankruptcy court had no jurisdiction to adjudicate the claim for breach of contract against Murray & Flood. For reasons of their own, the court and the trustee decided that the trustee should not intervene in and be substituted for the bankrupt-plaintiff in the suit pending in the State courts of New York. The bankruptcy court consented, therefore, that the trustee permit the suit to be continued in the name of the bankrupt with the understanding that the avails of same inure to the benefit of bankrupt's estate. Surely, this is far from a consent that the State court could or should determine claims to or liens against the proceeds of such suit.

It is imperative, therefore, in the interest of orderly administration of estates in bankruptcy, that this Court settle, once and for all, that a consent by a bankruptcy court that plenary action be taken to recover funds owing to a bankrupt may not be warped into a consent that the court in which such action is instituted also try and determine claims to or liens against the proceeds of such suit.

Nor can any action of the trustee herein be considered to have conferred such jurisdiction on the State court. The jurisdiction of the bankruptcy court cannot be af-

fected by officers of the bankruptcy court, either by waiver, estoppel or laches.

Isaacs v. *Hobbs Tie & Timber Co., supra;*
Whitney v. *Wenman, supra;*
In re Schermerhorn, supra.

Nor can there be any factual basis for any claim of such waiver or estoppel in the instant case. The trustee at no time conceded that the State court might determine the attorney's lien. In fact, counsel for the trustee stated to Mr. Justice Eder, Trial Judge of the cause in the Supreme Court for New York County, at the time the settlement was arrived at: "I wish to state on behalf of the trustee that the trustee does not recognize the validity of that lien and will take the proper steps to vacate same." The words of the court, in *Chicago, R. I. & P. Ry. Co.* v. *City of Owatonna, supra,* in a similar situation, are particularly applicable to the instant case. The court said, at page 227:

> "The contentions as to estoppel and as to laches may be shortly disposed of since there is no factual basis for either. Aside from this fact situation, there is no power in the officers of a bankruptcy court to affect this exclusive jurisdiction of that court whether by waiver, estoppel or laches."

E. A void order is subject to collateral attack which may be by injunction to restrain prosecution of void order.

The Supreme Court for New York County had no jurisdiction to determine the attorneys' lien of respondents. Its order awarding respondents a lien of 30% of any recovery was therefore a nullity. The acts of a

court without jurisdiction are void and subject to collateral attack.

Kalb v. *Feuerstein, supra;*
Grover and Baker Sewing Machine Co. v. *Radcliffe*, 137 U. S. 287, 34 L. Ed. 670, 11 S. Ct. 92;
Taylor v. *Sternberg, supra;*
31 Am. Jur., Judgments, Sec. 597.

Such collateral attack may be by injunction to restrain the enforcement of the void order.

31 Am. Jur., Judgments, Sec. 622, 623;
Freeland v. *Williams*, 131 U. S. 405, 33 L. Ed. 193, 9 S. Ct. 763;
Atchison, T. & S. F. R. Co. v. *Wells*, 265 U. S. 101, 68 L. Ed. 928, 44 S. Ct. 469.

And the bankruptcy court is a court of equity with power to issue injunctions to protect its jurisdiction from void orders of other courts.

Continental Ill. N. B. & T. Co. v. *C. R. I. P. R. Co., supra;*
Bankruptcy Act, Sec. 2 (15) (11 U. S. C. A., Sec. 11);
Judicial Code, Sec. 262 (28 U. S. C. A., Sec. 377).

Conclusion.

In conclusion, it is well to reiterate that the purpose of Article 1, Section 8, Clause 4, of the Constitution, and also of the Acts of Congress relating to bankruptcy enacted under authority of the Constitution, is to place the property of a bankrupt wherever found under the con-

trol of a single court for equal distribution among the bankrupt's creditors. *Straton* v. *New*, 283 U. S. 318, 320, 75 L. Ed. 1060, 51 S. Ct. 465; *Forrey* v. *Silberblatt* (C. C. A. 3), 78 F. 2d 1016. This necessarily includes the power and jurisdiction in such court over all cases and controversies between the bankrupt and his creditors for the collection of assets, the ascertainment of the validity and amount of liens thereon, and the determination of the method of their liquidation. *Isaacs* v. *Hobbs Tie & Timber Co., supra.*

The necessity for such provisions is admirably demonstrated in the instant case, where the Supreme Court of New York, undertaking to distribute assets of the bankruptcy court, without notice to or hearing the trustee or his attorney, awarded respondents a lien of 30 per cent of any recovery in the pending suit. In so doing, it made an award unquestionably erroneous under the decisions of the highest authority of that State. The Court of Appeals has time and time again reiterated that where a client discharges his attorney, no matter how arbitrary his reason be, such attorney may only recover for his services to the time of his discharge upon the basis of *quantum meruit. Martucci et al.* v. *Brooklyn Children's Aid Society et al.*, 284 N. Y. 408, 31 N. E. 2d 506; *Matter of Tillman, supra; Matter of Krooks, supra; Greenberg* v. *Remick & Co., supra; Martin* v. *Camp, supra; Matter of City of New York, supra.* In *Martucci et al.* v. *Brooklyn Children's Aid Society et al.*, the Court of Appeals, reversing a percentage award made by the lower courts, said:

> "The appellants moved for a substitution of attorneys and asked that the value of respondent's services be determined, * * * An order is before us which fixed respondent's lien at twelve and one-half per cent of any recovery secured or settlement made, but in no case less than $400.

> "Appellants urge that respondent's lien cannot be fixed on a percentage basis. Respondent is entitled to compensation on the basis of *quantum meruit*. A percentage allowance does not fall within the description of *quantum meruit*. The amount of recovery or settlement will depend on factors with some of which respondent has no concern. * * *."

In the instant case, respondents only object to submitting their claim to the bankruptcy court for determination. This objection is not sound. The bankruptcy court which has the duty of liquidating a lien against assets in an estate under its control, must have the power to determine the amount of the liability. It is not obliged to submit that question to another court. *Gross* v. *Bush Terminal Company* (C. C. A. 2), 105 F. 2d 930, 932; *Butzel* v. *Webster Apartments Co.* (C. C. A. 6), 112 F. 2d 362, 366.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the law may be properly and authoritatively defined, that the errors herein pointed out may be corrected, and that the judgment of the United States Circuit Court of Appeals for the Second Circuit should be reversed in order that justice may be done to petitioner; and that to such an end a Writ of Certiorari should be granted and this Court should review the decision of the United States Circuit Court of Appeals for the Second Circuit and finally reverse it.

Respectfully submitted,

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